92-224

NO. 92-_____

Supreme Court, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

October Term, 1992

In the Matter Of:

LUELLA BASSETT and ELIZABETH LaFOREST,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY J. ELLISON, ESQ.
Counsel of Record
Gregory, Moore, Jeakle,
Heinen, Ellison & Brooks
3727 Cadillac Tower
Detroit, MI 48226
(313) 964-5600

QUESTION PRESENTED FOR REVIEW

WHERE THE SUPREME COURT HAS HELD THAT A MILITARY BASE IS NOT A PUBLIC FORUM AND THAT THE BASE COMMANDER HAS THE DISCRETION TO EXCLUDE FROM THE BASE AND PROSECUTE FOR REEENTRY TO THAT BASE PERSONS WHOM HE HAS BARRED, DOES THE BASE COMMANDER HAVE THE AUTHORITY UNDER 18 U.S.C. 1382 UNILATERALLY TO EXTEND THE BOUNDARIES OF THE BASE SO AS TO ENCROACH UPON AN EASEMENT PREVIOUSLY GRANTED TO THE PUBLIC FOR HIGHWAY PURPOSES, AND THEREBY PROSECUTE FOR REENTRY TO THE BASE PROTESTORS OF U.S. NUCLEAR WEAPONS POLICY WHO HAVE CROSSED THE NEWLY EXTENDED "BOUNDARY" TO THE BASE?

Statement of Jurisdiction 1

Statement of the Case 3

Arguments for Granting the Writ

The Court of Appeals' holding that Petitioners' lawful use of the easement outside Wurtsmith AFB to exercise their free speech rights nonetheless amounted to reentry of that base in violation of 18 U.S.C. 1382 ignores the decisions of the Supreme Court, is in conflict with the decisions of other Circuit Courts of Appeal and ignores well-settled property law as interpreted by the Michigan Supreme Court. 12

Conclusion and Relief Requested 27

Appendix

TABLE OF AUTHORITIES

Cases

Bolender v. So. Michigan Telephone Co., 182 Mich. 646 (1914) 23

Cantieny v. Friebe, 341 Mich. 143 (1954) 24

Carr v. Bartell, 305 Mich. 317 (1943) 25

Flower v. United States, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972) 15, 16, 17

Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1978) 17

Harr v. Coolbaugh, 337 Mich. 158 (1958) 24

Hasselbring v. Koepke, 262 Mich. 466 (1933) 24

Missouri v. Jenkins, 496 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990) 2

Neal v. Gilmore, 141 Mich. 519 (1905) 25

Pontiac & Lapeer Plank-Road Co. v. Hilton, 69 Mich. 114 (1888) 25

Stewart v. Hunt, 303 Mich. 161 (1942) 24

United States v. Albertini, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) 13, 15, 16, 17

United States v. Parrilla Bonilla, 648 F.2d 1373 (1st Cir. 1981) 14, 18, 23-25

United States v. Vasarajs, 908 F.2d 443 (9th Cir. 1990) 14, 18-21

Statutes

18 U.S.C. 1382 passim

M.C.L. 247.189 26

Statute Involved

Title 18 UNITED STATES CODE Section 1382

Entering military, naval, or Coast Guard property

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof--

Shall be fined not more than $500 or imprisoned not more than six months, or both.

Statement of Jurisdiction.

The United States Court of Appeals for the Sixth Circuit issued its judgment in this case on February 24, 1992, *sub nom.*, ***United States v. LaValley,*** 957 F.2d 1309 (6th Cir. 1992). Petitioners filed a timely suggestion for rehearing *en banc* on March 6, 1992. The suggestion was circulated among the judges of the Circuit Court and no vote on rehearing *en banc* was requested. Thereafter, pursuant to Sixth Circuit Rule 14(a)[1], the suggestion was submitted to the original panel and treated

---

[1]The rule provides in relevant part the following:

Rule 14 *En Banc* -- Required Statement for Rehearing *En Banc*

(a) **Suggestion for Rehearing *En Banc*.**

* * *

A suggestion for rehearing en banc will also be treated as a petition for rehearing before the original panel.

as a petition for rehearing. The petition was denied on May 1, 1992.

Since the Court of Appeals treated the suggestion for rehearing *en banc* as a petition for rehearing in accordance with Sixth Circuit Rule 14(a), this petition for certiorari is timely presented. Pursuant to Supreme Court Rule 13.4, the time in which one may file a petition for certiorari is tolled until the date on which the rehearing request is denied by the Court of Appeals. ***Missouri v. Jenkins,*** 496 U.S. 33, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990)

This Court has jurisdiction to review the decision of the Court of Appeals affirming Petitioners' convictions pursuant to 28 U.S.C. 1254(1).

Statement of the Case

On September 4, 1990, Petitioners Luella Bassett and Elizabeth LaForest, among others, were charged with violating the second paragraph of 18 U.S.C. Section 1382 by reentering Wurtsmith Air Force Base on August 4, 1990. This charge was issued even though Petitioners never passed the chain link fence marking the base boundary and were, at the time of their arrest, lawfully using a pedestrian easement just outside that fence to protest government possession of nuclear weapons. These facts were supported by the trial record as follows.

1. The base boundary and the highway easement.

Wurtsmith's boundaries are established by a permanent chain link fence which surrounds its perimeter. The Air Force witnesses testifying at trial freely

admitted that Wurtsmith extended only so far as its permanent fence line. They also cited Air Force regulations substantiating the fact that Wurtsmith Air Force Base is contained within the permanent fence.

Immediately east of the perimeter fence line marking the base boundary is the easement for Iosco County highway F-41. This highway runs north of Oscoda, passes Wurtsmith and continues another 20 or 30 miles. The highway is not repaired or maintained by Air Force crews. These responsibilities lie solely with the Iosco County highway department. County workers plow the highway in winter months, and Oscoda Township police patrol it.

Although the paved portion of the roadway is only about 30 feet wide, the highway easement extends a full 75 feet in either direction from the center of the road. Wurtsmith's chain link perimeter

fence stands on the western boundary of the easement where the road passes the base. A grassy strip occupying the portion of the easement between the paved roadway and the fence is frequently used by pedestrians, joggers, and recreational snowmobilers.

Facts established at trial showed the easement was created when the federal government conveyed to the State of Michigan a right of entry for the purpose of constructing and maintaining the highway in front of the base. The easement document described the nature of the conveyance to the State in the following terms:

> Paragraph 6. The United States reserves the right to make such connections between the road herein authorized and the roads and streets on said military reservation as the chief of engineers may from time to time consider necessary, and also reserve to it rights of way for all purposes across, over and/or under the right of way hereby granted; *provided, however, that such rights shall be*

used in a manner that will not create unnecessary interference with the use and enjoyment by the grantee of said rights of way or for highway purposes.

2. The blocking of the highway easement.

In complete disregard for the base's contractual obligation not to interfere with the highway easement, Wurtsmith's base commander ordered a temporary barrier of day-glo orange, vinyl snow fencing to be erected outside the base's chain link fence line. This temporary fencing was erected on August 4, 1990 and ran directly from the permanent fence to the edge of the paved portion of Highway F-41. It completely blocked the pedestrian easement on the west side of the highway at a point several hundred feet north of the driveway that leads to the base's main gate. On that same date, Petitioners walked two miles southbound on the grassy easement between the fence line and the paved portion of

highway F-41. When they attempted to proceed past the temporary fencing which blocked the pedestrian easement, they were warned by base security police officers that the temporary vinyl fence marked a new "boundary" of the base; and that they had entered the base at the time they crossed over that piece of vinyl. Petitioners were then arrested, questioned, photographed, held for several hours, and released. The arrests were made within the pedestrian easement on the grassy strip adjacent to the highway; and at no time did Petitioners pass the base's actual boundary marked by the chain link fence. Notwithstanding these facts, Petitioners were prosecuted for reentry to a base from which they previously had been barred.

3. The criminal prosecution.

Petitioners were arraigned before U.S. District Judge Robert Cleland on October 3, 1990. Each Petitioner entered a plea of not guilty to the charge.

A bench trial was conducted on December 4, 10 and 11, 1990. At trial's end, Petitioners were convicted as charged. In convicting Petitioners under Section 1382, the district judge specifically found that the base commander had the right to extend the base boundary and encroach on the easement regardless of the limited nature of the conveyance set forth in the easement documents.

On January 11, 1991, Petitioner Bassett was sentenced to a term of imprisonment of 60 days and a fine of $1,000.00. Petitioner LaForest was ordered to serve 21 days in jail and to pay a fine of $1,000.00.

4. The appeal.

On January 24, 1991, each Petitioner filed a claim of appeal to the United States Court of Appeals for the Sixth Circuit. After receiving briefs on all questions presented, the court heard oral argument on November 5, 1991. Thereafter, on February 24, 1992, the court, with one judge dissenting, issued its opinion and order affirming the findings of the trial court. ***United States v. LaValley,*** 957 F.2d 1309 (6th Cir. 1992).

In addressing the easement issue, the majority wrote:

> The mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred.

Id. at 1313.

Dissenting Judge James Ryan maintained that Petitioners did not violate section

1382 for the simple reason that "they did not reenter Wurtsmith." *Id.* at 1318. Judge Ryan took strong issue with the majority:

> In reaching its conclusion, the majority opinion ignores both the documentary evidence adduced at trial and controlling property law as established in the state of Michigan. * * * The base commander's order to erect a fence, preventing pedestrians from traversing the grassy strip that was long ago set aside for public use and forcing them to walk on the paved portion of F-41, interfered with the use of the public easement.
>
> * * *
>
> When the base commander ordered the temporary fence erected, he unilaterally reclaimed a portion of the easement which he was not free to occupy absent permission from the easement holder, the state of Michigan, or, conceivably, exigent circumstances not claimed to exist.

Id. at 1317-18.

A timely suggestion for rehearing *en banc* was filed on March 6, 1992; it was treated by the court as both a suggestion

for *en banc* rehearing and as a petition for rehearing. It was denied on May 1, 1992.

This petition follows.

ARGUMENTS FOR GRANTING THE WRIT

The Court of Appeals' holding that Petitioners' lawful use of the easement outside Wurtsmith AFB to exercise their free speech rights nonetheless amounted to reentry of that base in violation of 18 U.S.C. 1382 ignores the decisions of the Supreme Court, is in conflict with the decisions of other Circuit Courts of Appeal and ignores well-settled property law as interpreted by the Michigan Supreme Court.

Introduction

On August 4, 1990, Petitioners did not pass the permanent chain link fence that marks the base boundary of Wurtsmith Air Force Base. Instead, they remained on the easement adjacent to the base, using it for one of the limited purposes for which it had been granted.

The government's prosecution depended almost entirely on its bizarre claim that Petitioners had actually reentered the base by crossing a brand new, completely temporary, snow fence erected outside the

base's boundary. Clearly, the base commander had absolutely no authority to encroach on the easement, erect the vinyl snow fence, and thereby keep Petitioners and others from walking along this small stretch of public land.

In finding that the base commander had the unilateral authority to impinge upon Petitioners' lawful exercise of First Amendment rights by temporarily enlarging the base, the Court of Appeals ignored the Supreme Court's decision in ***Flower v. United States***, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653, and wrongly decided a question left open by this Court in ***United States v. Albertini***, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985).

In addition, the decision of the Court of Appeals in this case conflicts directly with the decisions of two other circuit courts of appeal. *Cf.*, ***United States v.***

Vasarajs, 908 F.2d 443 (9th Cir. 1990); *United States v. Parrilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981).

Finally, the Court of Appeals decided the federal question presented ("What constitutes 'reentry' on a military base?") in a manner which blindly ignored state property law established by the Michigan Supreme Court.

Under the circumstances, review by this Court is imperative.

1. The Court of Appeals decided the federal question of "reentry" contrary to established Supreme Court precedents.

In the instant case, the Court of Appeals held that the base commander had the authority to reoccupy a highway easement so as to deprive Petitioners of their rights not only to use that highway for transportation purposes but also to use the easement as a public forum. In doing

so, the court ignored this Court's decision in ***Flower v. United States***, 407 U.S. 197, 92 S.Ct. 1842, 32 L.Ed.2d 653 (1972). In that case, an individual who had been barred from Fort Sam Houston in San Antonio, Texas, reentered the same military reservation. At the time of his arrest for reentry, he was "quietly distributing leaflets on New Braunfels Avenue at a point within the limits" of the fort. *Id., op cit.* The street at that location was open to unrestricted civilian traffic at all hours. Commenting on this case in ***Albertini***, the Supreme Court determined "that New Braunfels Avenue was a public thoroughfare no different than other streets in the city, and that the military had abandoned not only the right to exclude civilian traffic from the avenue, but also any right to exclude leafleteers." 472 U.S. at 685, 105 S.Ct. 2897, 86 L.Ed.2d at

546. This Court, in ***Albertini***, went on to define the narrow holding of ***Flower***:

> *Flower* establishes that where a portion of a military base constitutes a public forum because the military has abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment.
>
> 472 U.S. at 685, 686; 105 S.Ct. 2897; 86 L.Ed.2d at 546.

In the instant case, the military at Wurtsmith went a step further than did the authorities at Fort Sam Houston. Not only did the military at Wurtsmith abandon the right to exclude civilian traffic from the full width of highway F-41, it did so formally, through the express grant of an easement to the State of Michigan and its citizens. By granting this easement the federal government removed the highway and its adjacent property from the base itself, thus protecting from prosecution under

Section 1382 any activity which might occur there.

Although this Court has held that there is "no generalized constitutional right to make political speeches or distribute leaflets" on military bases, ***Greer v. Spock***, 424 U.S. 828, 838, 96 S.Ct. 1211, 47 L.Ed.2d 505; ***Albertini***, 424 U.S. at 685, 105 S.Ct. 2897, 86 L.Ed.2d at 685, those expressive activities may freely occur in any place appropriately considered to be a public street. As this Court held in ***Flower***, those activities are entitled to the full protection of the First Amendment.

Petitioners in this case were expressing their disagreement with the nuclear weapons policy of the federal government. They were doing so on a public street, outside a military reservation when they were arrested for reentry of a military base. In affirming Petitioners'

convictions, the Court of Appeals legitimized the base commander's unlawful action and impinged upon Petitioners' freedom of expression. This holding cries out for correction by this Court.

2. The Court of Appeals' decision holding that Petitioners had reentered Wurtsmith is in direct conflict with decisions of other Circuit Courts of Appeal on the same issue.

The Court of Appeals held that Petitioners had reentered Wurtsmith when they crossed the temporary snow fence, even though they never approached the base's actual boundary.

This decision is in direct conflict with the Ninth Circuit's holding in ***United States v. Vasarajs***, 908 F.2d 443 (9th Cir. 1990), and the First Circuit's holding in ***United States v. Parrilla Bonilla***, 648 F.2d 1373 (1st Cir. 1981).

In ***Vasarajs***, the defendant was prosecuted under 18 U.S.C. 1382 for reentry

of a military installation. In her defense, she claimed that because the public was allowed to travel that portion of road between the highway exit ramp and the fort's guard shack, the government had relinquished its control over the road despite its legal title to the land under it. In analyzing this argument, the court acknowledged the cases stating that "the fact that the United States has title to land contained within a reservation is insufficient to prove that the land is part of the reservation." But the court stated:

> ... these cases merely stand for the uncontroversial proposition that record title does not unfailingly denote the title holder's "absolute ownership, or an exclusive right to the possession" of the property in question.
>
> *Id.* at 446.

The court explained this "uncontroversial proposition" as follows:

> A servitude may exist on the land. See [*United States v.*] *Watson*, 80 F.Supp. [649] at 651 [(E.D.Va. 1948)] (easement residing in the public). Alternatively, title itself may have been taken away from an initial owner by adverse possession. *Barring these relatively rare situations which can only arise pursuant to application of exacting statutory or common-law rules* requiring at a minimum abandonment for a specified period of time, *whoever owns a given parcel of land should have the right of exclusive control.* There is no generalized notion of abandonment in property law *apart from these highly particularized rights.*
>
> *Id.* (citations and footnotes omitted; emphasis supplied).

The Ninth Circuit affirmed the defendant's conviction, finding that the fort had not granted an easement which would permit her to be on that land.

In contrast to the fort in ***Vasarajs***, the federal government in the instant case expressly granted an easement 150 feet wide immediately east of the chain link fence line of Wurtsmith Air Force Base. In doing so, the government completely relinquished

its right of exclusive control over that strip of land. Petitioners were peaceably using the easement for its intended purpose and the government had no right whatsoever to interfere with them -- much less to arrest and charge them with reentry. The decision of the Sixth Circuit Court of Appeals affirming Petitioners' convictions therefore conflicts with the Ninth Circuit's holding in ***Vasarajs*** and warrants review by this Court.

The Court of Appeals' decision in the instant case also conflicts with the First Circuit's findings in ***United States v. Parrilla Bonilla***, *supra*. There, civilians were prosecuted under 18 U.S.C. 1382 for entry onto an island the Navy used for amphibious landings. The government originally asserted that defendants had stepped onto the island base when they passed the "brim line," the ordinary high

tide line of the island. When it was unable to prove that the defendants had walked onto the island that far, the government changed its theory of the case and argued that the entire beach was part of the base.

In considering the government's claim the First Circuit noted that "the most obvious and basic element of a section 1382 prosecution is a demonstration that the defendant entered a 'military reservation.'" *Id.*, at 1383. It then held that "the government is bound for purposes of these prosecutions by the border line it established at trial." *Id.*, at 1385. As the defendants in that case had not crossed the border line defined at trial, the government was not permitted to modify the border in order to obtain convictions under the statute.

The uncontroverted evidence in the instant case established that the chain link fence marked the boundary of Wurtsmith. It was this boundary, and no other, which Petitioners were required to pass in order to "reenter" the base. The Court of Appeals erroneously held that the base commander was allowed to move the base boundary onto land he had expressly given to the State of Michigan in order to restrict Petitioners' rights to demonstrate on that land. This decision was directly in conflict *Parrilla Bonilla* and warrants further examination by this Court.

3. The Court of Appeals' holding that the base commander had the authority to reoccupy the easement has blatantly ignored the law of easements as established in Michigan.

It is settled law in Michigan that the public acquires a right of way on a highway with the full rights incident thereto. *Bolender v. So. Michigan Telephone Co.*, 182

Mich. 646 (1914). As a general rule, the fee owner can use his land for any purpose not inconsistent with the rights of the owner of the easement. ***Cantieny v. Friebe***, 341 Mich. 143 (1954); ***Harr v. Coolbaugh***, 337 Mich. 158 (1958); ***Hasselbring v. Koepke***, 262 Mich. 466 (1933). Stated another way, the owner of the servient estate cannot use his property in such a way as to obstruct the easement. ***Stewart v. Hunt***, 303 Mich. 161 (1942). Indeed, insofar as they relate to the grant of the easement, the rights of the owner of the easement are paramount to those of the owner of the fee. ***Cantieny***, *supra*; ***Hasselbring***, *supra*.

It is also settled law in Michigan that an unauthorized obstruction of or encroachment upon a highway is unlawful and constitutes a nuisance. Thus, an unauthorized obstruction across a public

street is a public nuisance which any citizen desiring to travel along the street may abate, provided he can do so without a breach of the peace. ***Pontiac & Lapeer Plank-Road Co. v. Hilton***, 69 Mich. 114 (1888); ***Neal v. Gilmore***, 141 Mich. 519 (1905). Anything which wrongfully interferes with the privilege to which the owner of the easement is entitled, by making its use less convenient and less beneficial than before, constitutes a wrongful obstruction subject to abatement. ***Carr v. Bartell***, 305 Mich.317 (1943).

The Michigan legislature has codified these principles as they relate to public highways in the following terms:

> All public highways for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given, or purchased, and no encroachments by fences, buildings or otherwise which may have been made since the purchase, dedication or gift ... shall give the party ... so

> encroaching, any title or right to the land so encroached upon.
>
> M.C.L. 247.189

Petitioners' action in crossing the temporary snow fence had the legal effect of abating the nuisance wrongfully erected by the Air Force. Petitioners were privileged to abate this nuisance because their rights to use the easement for its intended purpose of transportation were paramount to all other uses and because they were able to do so without breaching the peace. In exercising this right to abate, Petitioners as a matter of law did not become trespassers.

In deciding the federal question of what constitutes "reentry" under 18 U.S.C. 1382, the Court of Appeals has ignored the well-settled law of easements in the State of Michigan. Its holding that the base commander had the right to erect a fence

blocking the easement is directly contrary to the holdings of the Michigan Supreme Court on this point. As such, the decision warrants review by this Court.

Conclusion and Relief Requested

For all the reasons set forth herein, Petitioners' pray that this Court issue a writ of certiorari to the Court of Appeals for the Sixth Circuit in order to set right that court's meritless decision.

Respectfully submitted,

JEFFREY J. ELLISON, ESQ.
Counsel of Record
Gregory, Moore, Jeakle,
Heinen, Ellison & Brooks
3727 Cadillac Tower
Detroit, MI 48226
(313) 964-5600

Dated: July 30, 1992

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 91-1119/1120/1123/
1124/1125/1126/1127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

HELEN M. LAVALLEY;
JACQUELINE HUDSON;
JOHN S. ECCLESTONE, II;
PETER C. DOUGHERTY;
LUELLA C. BASSETT;
ELIZABETH LAFOREST;
and KIM LEITH,
Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan

---

Decided and Filed February 24, 1992

Before: KEITH, RYAN, and TIMBERS,* Circuit Judges.

---

*The Honorable William H. Timbers, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

TIMBERS, Circuit Judge, delivered the opinion of the court, in which KEITH, Circuit Judge, joined. RYAN, Circuit Judge (pp. 12-18), delivered a separate dissenting opinion.

TIMBERS, Circuit Judge. Appellants John Ecclestone II, Luella Bassett, Kim Leith, Helen LaValley, Jacqueline Hudson, Peter Dougherty, and Elizabeth LaForest appeal from a judgment entered December 11, 1990, after a bench trial, in the Eastern District of Michigan, Robert H. Cleland, *District Judge*, upon a verdict of guilty on the charge of wrongfully entering a military base in violation of 18 U.S.C. § 1382 (1988).

On January 17, 1991, Judge Cleland sentenced Ecclestone to 12 months probation and a $2,000 fine; Bassett to 60 days imprisonment and a $1,000 fine; LaForest to 21 days imprisonment and a $1,000 fine; Leith to 12 months probation and a $2,000 fine; LaValley to 12 months probation and a $2,000 fine; Hudson to 60 days imprisonment and a $1,000 fine; and Dougherty to 60 days imprisonment and a $1,000 fine.

Appellants have appealed their convictions. Execution of their sentences has been stayed pending appeal.

Appellants assert several claims of error, including, among others, the following: (1) LaValley, Hudson and Ecclestone contend that they were improperly denied a jury trial; (2) Dougherty contends that he was barred improperly from entering the base; (3) Ecclestone, Bassett, LaForest and Leith contend that they did not re-enter the base as alleged by the government; (4) Ecclestone, Bassett, LaForest, and Leith contend that the district court erred in allowing the government to introduce certain evidence in violation of the hearsay rule; and (5) that his first amendment rights were violated by the military's "selectively targeting political or protest demonstrations" in an area open to the public.

Furthermore, Ecclestone, Bassett, LaForest and Leith contend that they were denied fundamental fairness and due process because they were told by the military that $500 was the maximum fine and the actual fines imposed exceeded that amount.

Moreover, Dougherty contends that, since he received a bar letter in 1983 and was convicted in 1987 of unlawful re-entry onto Wurtsmith Air Force Base (WAFB), the double jeopardy clause bars his prosecution; and that his Fourth, Fifth and Sixth Amendment rights were violated when he was detained for four hours, fingerprinted, and questioned regarding his date of birth, driver's license and address.

For the reasons that follow, we affirm the convictions of all appellants.

I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

WAFB is a federal military installation located in Iosco County, Michigan. The federal government has granted Iosco County a one hundred fifty foot easement for the construction, maintenance and use of county highway F-41 which runs adjacent to WAFB. In addition to covering the roadway, the easement extends to cover approximately sixty feet on each side of F-41. On the base side of the highway, the easement includes a grass strip located between the "white line" marking the edge of the roadway, and a permanent chain link fence. Appellants assert that this strip is used frequently by pedestrians, joggers, and snowmobilers in the winter months.

On August 4, 1990, an orange snow fence, approximately three to four feet high, was placed along the white line marking the entrance to the base. The

fence extended along the white line adjacent to F-41 for some distance until it ended running perpendicular to the road, across the grassy strip, and joining the permanent steel chain link fence. Pedestrian traffic was blocked on the grassy strip adjacent to WAFB at the point where the snow fence intersected the permanent steel fence. Senior Master Sergeant Brian Clever testified that appellants, along with a group of approximately four hundred other protestors, marched down the grassy strip toward the base entrance until they encountered the orange snow fence. Warning signs were mounted on the snow fence roughly every twenty feet, stating: "It is unlawful to enter this area without permission of the installation commander." On August 4, 1990, protestors pushed down the snow fence and about one third of them entered the restricted portion of WAFB. At this time, Sergeant Clever read the following prepared statement to appellants, ordering them to leave the base:

> "You are on a United States military reservation at Wurtsmith Air Force Base, Michigan.
>
> Specific permission of the installation commander is required for entry onto Wurtsmith Air Force Base and that permission has not been granted.
>
> The installation commander has determined that any political or protest demonstration taking place within the boundaries of Wurtsmith Air Force Base could interfere with the mission of the 379th Bombardment Wing.
>
> By order of the installation commander, Wurtsmith Air Force Base, you are hereby ordered to leave Wurtsmith Air Force Base.
>
> Your continued presence in Wurtsmith Air Force Base will place you in violation of the lawful order to leave and you will also be in violation of lawful regulations prohibiting your entry onto Wurtsmith Air Force Base.

> Your continued presence on Wurtsmith Air Force Base may render you criminally liable for violation of federal law.
>
> You are again ordered to depart Wurtsmith Air Force Base immediately."

Since appellants failed to leave after receiving these warnings, they were detained for wrongful entry onto a military base in violation of § 1382. Air Force personnel recorded these events on video tape and presented the tapes as evidence at appellants' trial.

The district court found that appellants previously had entered WAFB and had received letters from the base commander barring them from future entry. These findings were based on testimony by Sergeant William Stern, a noncommissioned officer in charge of the Security Police Reports and Analysis Section, that letters barring from the base all appellants were prepared and maintained in the ordinary course of business. The court found that these letters established that appellants previously had wrongfully entered the base and had been barred from future entry by the base commander. These documents were admitted pursuant to the business records exception to the hearsay rule. Fed. R. Evid. 803(6).

In rendering his decision, Judge Cleland made two additional pertinent findings. He found that "the area in question in this case had not been converted into any form of a public forum for the dissertation of political or religious or any other kind of protected speech", and that the First Amendment is not "implicated in any way in this case."

II.

We turn first to the contentions of LaValley, Hudson and Ecclestone that they were entitled to a trial by jury because a violation of § 1382 is a "serious" rather than "petty" offense. The Sixth Amendment provides that

"[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." U.S. Const. amend. VI. The Supreme Court, however, has not pursued a literal interpretation of this language, carving out an exception to the rule for "petty offenses". *E.g.*, *Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989). A "petty offense" is one in which the defendant would be subject to no more than a six month period of incarceration. *Id.* at 542-53. In cases where the maximum sentence cannot exceed six months, "[a] defendant is entitled to a jury trial in such circumstances *only* if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 543 (emphasis added). Such situations, however, are rare. *Id.* Since the maximum statutory punishment for violations of § 1382 is only a six month period of incarceration, a fine of $5,000 and a five year term of supervised release, the offense is "petty" within the meaning of *Blanton*. Appellants accordingly are not entitled to trial by jury. *United States v. Floyd*, 477 F.2d 217, 222 (10th Cir.), *cert. denied*, 414 U.S. 1044 (1973) ("The violation of [s]ection 1382 ... constitutes a petty offense not requiring a trial by jury.").

Ecclestone asserts an additional challenge to the district court's denial of a jury trial. Ecclestone is licensed to practice law in the State of Michigan. His license may be revoked by the Michigan Supreme Court for violations of the laws of the United States. *Cf. United States v. Craner*, 652 F.2d 23, 26 (9th Cir. 1981) ("the threat of loss of a license as important as a driver's license ... is another sign that the DUI defendant's community does not view DUI as a petty offense"). We reject Ecclestone's contention that this additional factor made his violation of § 1382 a "serious" offense. His contention is without merit because the revocation of his bar license is not statutory and because the revocation of his license would

not directly follow a conviction under § 1382. Michigan Court Rules § 9.110-12 (providing for a full hearing before a review board prior to the revocation of an attorney's license). Moreover, Ecclestone's assertion, pursued to its logical conclusion, would mean that lawyers have a special right to jury trials because their licenses arguably may be revoked for any infraction of the law. We decline the invitation to create such an exception to *Blanton*.

III.

This brings us to the merits of appellants' contentions that their conduct was not prohibited by § 1382. Ecclestone, Bassett, LaForest, Leith and Dougherty contend that the prosecution of them was wrongful because the evidence is insufficient to support a conviction under § 1382 which provides in relevant part:

> "Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof ... [s]hall be fined not more than $500 or imprisoned not more than six months, or both."

The Alternative Fine Act, 18 U.S.C. § 3571 (1988), raises the ceiling on the maximum fine for infractions of § 1382 from $500 to $5,000. Appellants contend that two of the prerequisites of § 1382 have not been satisfied. Ecclestone, Bassett, LaForest and Leith argued that they did not wrongfully re-enter the base. Dougherty, on the other hand, contends that he was not barred previously from WAFB by the base commander.

(A)

We first turn to the contention of Ecclestone, Bassett, LaForest and Leith that there was insufficient evidence to support their convictions because the federal government

had granted Michigan an easement to use the land adjacent to highway F-41, and appellants therefore were lawfully on the grassy strip at the time they were taken into custody. We disagree.

In *United States v. McCoy*, 866 F.2d 826 (6th Cir. 1989), we held that the grassy strip in question is part of WAFB. In *McCoy*, we addressed the issue as to whether the driveway at the main entrance to WAFB is part of the base for purposes of § 1382. In resolving that issue, we cited the district court's finding that "there isn't any question that the entire area up to at least the center of the road, if not beyond, is a part of the military base...." *Id.* at 831. The grassy strip on which the protestors were apprehended in the instant case was within the boundary that we already have determined to be part of the base. The mere fact that an easement had been granted to the state for the construction, maintenance and use of highway F-41 did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred.

A different question would be presented if appellants' only intrusion into the base was driving an automobile on F-41. *Id.* In *United States v. Albertini*, 472 U.S. 675 (1985) (Stevens, J., dissenting), a case where a defendant was convicted under § 1382 for re-entering Hickam Air Force Base, Hawaii, Justice Stevens stated that "highways or other public easements often bisect military reservations," and that:

> "If an individual who has been removed from Hickam is liable under § 1382 whenever he is thereafter 'found within' its boundaries, he risks criminal punishment every time he departs on an airline flight that may use the runway traversing the base. The use of these military lands for the limited public purposes for which they have been set aside does not involve the bold defiance of authority that is foreseen by the structure of the statute and reflected in its legislative history."

Id. at 698-99.

Unlike Justice Stevens' hypothetical person innocently traversing a highway or crossing a military runway, appellants in the instant case boldly defied military orders. They crossed over a snow fence on which warning signs were posted. They remained on the base even after they were ordered to leave by the base authorities.

For these reasons we hold that the district court's conclusion that appellants had re-entered WAFB unlawfully was not erroneous.

(B)

We turn next to Dougherty's contention that there was insufficient evidence to support his conviction because the bar orders were improperly issued. Specifically, Dougherty contends that the orders were invalid because they were not prepared by the base commander and he had not been barred previously from the base within the meaning of § 1382. In making this contention, Dougherty points to the "fill-in-the-blanks" nature of the bar letters. We are not persuaded.

The district court held that, although the bar letters were pre-signed by the base commander, they were issued only after the commander had given his authorization on a case-by-case basis. Contrary to Dougherty's contention, there is no requirement that the base commander perform the administrative task of "filling-in-the-blanks" in the bar letters. There is no basis for concluding that the district court's holding that the bar letters were properly issued was erroneous.

IV.

We now turn to the contention of Ecclestone, Bassett, LaForest, and Leith that the district court improperly admitted the bar letters pursuant to the business records exception to the hearsay rule because the letters were

prepared for the purpose of litigation. We find no merit in this contention.

The district court stated: "The testimony, the Court is satisfied, does establish that the records were kept in a regular fashion, that they were part of a regular activity of the enterprise and the provisions of 803(6), I think are sufficient." Although "conclusions of law, such as whether proffered evidence constitutes hearsay within the meaning of Federal Rules of Evidence, are reviewed de novo," *United States v. Levy*, 904 F.2d 1026, 1029 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 974 (1991), the issues to be resolved in the instant case do not involve either questions of law or the application of the law to factual determinations. Rather, the district court simply made factual findings that the bar letters were not prepared for purposes of litigation. Since we will not set aside a district court's findings of fact unless clearly erroneous, *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989), and since we hold that the court's factual findings were not erroneous, we reject appellants' contention that the bar letters were improperly admitted.

V.

Finally, we consider the contention of appellant Dougherty that his First Amendment rights were violated by the government's "selectively targeting political or protest demonstrations" in an area open to the public. This argument is without merit. Military bases are not public forums. *Greer v. Spock*, 424 U.S. 828, 838 (1975) ("The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false."); *McCoy*, *supra*, 866 F.2d at 832-34. Because we have already held that the grassy strip where appellants were apprehended was part of WAFB, Dougherty's claim must necessarily fail. Furthermore, even if the area in question is a public forum, appellant's claim still fails. In *Albertini*, *supra*, 472 U.S. at 688, the

Court found that § 1382 is content-neutral, and "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests." We find that appellant's speech was at most only incidentally burdened. The bar letters only forbid his entrance onto the WAFB, appellant was still free to protest outside of the base.

VI.

To summarize:

We hold that appellants' convictions should be affirmed. First, since we hold that a violation of § 1382 is not a "serious" offense for Sixth Amendment purposes, the district court did not err in denying appellants a jury trial. Second, there is no basis for concluding that there was insufficient evidence to support appellants' convictions. Despite the lawful issuance of letters barring appellants from WAFB, appellants boldly defied military authorities. Third, there is no support for appellants' claim that the district court was clearly erroneous in admitting the bar letters pursuant to the business records exception to the hearsay rule. Finally, the military's prohibition on appellants entering WAFB did not violate the First Amendment. We find no merit in any of appellants' claims of error.

Affirmed.

RYAN, Circuit Judge, dissenting. In my judgment, the government failed to prove that the defendants violated 18 U.S.C. § 1382 because they were not shown to have reentered the Wurtsmith Air Force Base. The evidence in this case demonstrated that the grassy strip on which the defendants were walking is not part of the air base but is within an easement for public use which has been granted to the state of Michigan in connection with the use of Highway F-41.

Part of a proper analysis to determine whether the defendants had reentered the Wurtsmith Air Force Base is to identify what is not involved in this case. What is not involved is any question whether the defendants improperly interfered with the lawful order of military authorities in connection with any national or public emergency, or the lawful exercise of the police powers of the federal government. The only issue relating to the sufficiency of the evidence is whether the defendants violated section 1382 by reentering the Wurtsmith Air Force Base.

I.

In part III.(A), the majority opinion considers whether the federal government granted Michigan an easement to use the land adjacent to Highway F-41 for highway purposes and, if so, whether that land is, nevertheless, part of Wurtsmith Air Force Base. Acknowledging that such an easement exists, the opinion concludes: "The mere fact that an easement had been granted to the state for the construction, maintenance and use of Highway F-41 did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred." Respectfully, it seems to me that that conclusion merely begs the question whether the easement is part of the air base. Rather than analyzing that question, the majority opinion merely declares that the issue has been decided: "In *United States v. McCoy*, 866 F.2d 826 (6th Cir. 1989), we held that the grassy strip in question is part of WAFB."

The majority opinion then quotes a portion of *McCoy* in which this court merely quoted a statement by the district court in that case that "the entire area up to at least the center of the road" is part of Wurtsmith Air Force Base.

In my view, the majority's reliance upon *McCoy* is misplaced and, as a result, its conclusion that *McCoy* decides this case is mistaken.

McCoy did not address the nature of the Air Force's property interest in the land between the permanent chain link fence and the paved portion of F-41. Rather, *McCoy* focused only upon the driveway leading from F-41 into the base, and this court affirmed the district court on two points: (1) The *McCoy* court agreed with the district court's conclusion that the driveway was part of the base, holding that "we are certainly in no position to quarrel with Judge Churchill's findings that the *driveway area* was 'within control of the military' and that '[a]nybody has to have their head in the sand not to see it . . . .'" *Id.* at 832 (emphasis added). (2) The *McCoy* court held that the defendant in that case, Joan McCoy, was not using the driveway area for its proper public purpose. In explaining its decision, the *McCoy* court noted:

> But the authorities at Wurtsmith Air Force Base made no attempt to prevent Mrs. McCoy from using the southbound traffic lane of Highway F-41 for the limited public purpose for which it had been set aside. . . . The *driveway area* to the west of the boundary line had not been set aside as a public forum, and Mrs. McCoy's insistence on crossing the line to use the *driveway* for that purpose involved precisely the sort of "bold defiance of authority" that was missing in Justice Stevens' hypothetical airline passenger case.

McCoy, 866 F.2d at 831 (quoting *United States v. Albertini*, 472 U.S. 675, 699 (Stevens, J., dissenting) (1985)) (emphasis added). Nowhere in *McCoy* did the

court hold "that the grassy strip in question is part of Wurtsmith Air Force Base."

II.

The decisive issue in this case is whether the defendants, when they were arrested on August 4, 1990, had "reenter[ed] or [were] found within the limits of the United States military reservation at Wurtsmith Air Force Base, Michigan" as prohibited by the bar letters previously issued to them. When arrested, the defendants were not on the driveway leading into Wurtsmith, as in *McCoy*, but rather were on the grassy strip of land between the permanent chain link fence that marks off the boundary of the base and the edge of the pavement of F-41. It appears to me, based upon the documents in evidence in this case, the finding of the trial court, and the applicable Michigan statute, that, as a matter of law, the grassy strip in question is not a part of Wurtsmith.

A.

It is indisputable that the federal government has a property interest of some sort in the land on which F-41 sits. The nature and extent of that interest are somewhat unclear. Nevertheless, the documents admitted into evidence in the trial below demonstrated that the state possesses an easement 150 feet wide for highway purposes.

Exhibit 22, referred to during trial as Document D, establishes that the federal government granted the state of Michigan an easement for highway purposes. Exhibit 22 is a Permit for Extension of Road Across Military Reservation from the Secretary of War to the State of Michigan, dated June 21, 1946. It grants to the state "permission to extend a road across the Oscoda Army Air Field, Oscoda, Michigan, which road is designated as Michigan State Highway M-171, said road being, in general, along the Northeasterly boundary of the Oscoda

Army Air Field . . . ." Paragraph 6 of this document reads:

> The United States reserves the right to make such connections between the road herein authorized and the roads and streets on said military reservation as the chief of engineers may from time to time consider necessary, and also reserve to its rights of way for all purposes across, over and/or under the right of way hereby granted; provided, however, that such rights shall be used in a manner that will not create unnecessary interference with the use and enjoyment by the grantee of said rights of way or for highway purposes.

Although this document establishes the fact of the right of way, it does not specify its width.

An earlier document described the width of the easement. Exhibit 21, referred to as Document C, is a Highway Easement Release from the Michigan Department of Conservation to the State of Michigan dated February 12, 1943. It conveyed to the state "an easement for highway purposes [] in . . . [a] strip of land 150 feet in width lying 75 feet each side of and adjacent to the center line of M-171 as now surveyed over and across the [described land tracts in] (Oscoda Township, Iosco County), Michigan." The Air Force's property record witness, Captain Reed, testified that M-171 is essentially the present day F-41. Based on this document, the parties entered into, and the district court accepted, a stipulation that the easement was 150 feet wide.[1]

---

[1]The following exchange occurred at trial regarding the width of the easement:

> THE COURT: Is there any doubt that the military -- either the Army or the Air Force -- at one time or another granted easements for the purpose of construction and maintaining this highway?

Evidence adduced at trial demonstrated that the public has continuously used the right of way. Testimony from Air Force personnel indicated that joggers and disabled cars regularly use the shoulder of F-41 at will.

Despite the legal existence of the easement and its continuous use by the public, the base commander unilaterally occupied the easement on August 4, 1990 by erecting a temporary snow fence extending from the chain link fence to the edge of the pavement of F-41. In doing so, the base commander undertook to extend the limits of the base beyond the permanent boundary as established by the chain link fence and in disregard of the long-standing use of the land as part of the public way. The district court held that the base commander's action was appropriate, noting: "I find that the Air Force Base Commander has a right to control all of the property to the edge of the roadway." The majority opinion affirms this holding.

In reaching its conclusion, the majority opinion ignores both the documentary evidence adduced at trial and controlling property law as established in the state of Michigan. The permit granting Michigan the right to build and maintain F-41 stated that the rights retained by the United States "shall be used in a manner that will not

---

MR. ELLISON: I believe the government has just stipulated to it with my proposed stipulation of the facts from the McCoy case.

MR. BRUNSON: No, there's not a significant problem with that.

THE COURT: What's the need for the document then?

MR. ELLISON: I just want to show the easement is 150 feet wide, your Honor.

THE COURT: Do you have any doubt about that, Mr. Brunson?

MR. BRUNSON: That's what the document says.

THE COURT: *Why don't you take that as proven, let's move along here.*

(Emphasis added.)

create unnecessary interference with the use and enjoyment by the grantee of said rights of way or for highway purposes." The base commander's order to erect a fence, preventing pedestrians from traversing the grassy strip that was long ago set aside for public use and forcing them to walk on the paved portion of F-41, interfered with the use of the public easement.

Further, the base commander lacked the right to reoccupy the grassy strip. Michigan statutes establish that once given, a right of way for highway purposes may not be encroached:

> All public highways for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given, or purchased, and no encroachments by fences, buildings or otherwise which may have been made since the purchase, dedication or gift . . . shall give the party or parties, firm or corporation so encroaching, any title or right to the land so encroached upon.

Mich. Comp. Laws Ann. § 247.189 (West 1990). Michigan courts have held that the state retains the entire easement even if it only uses a portion of it for the actual paved portion of the highway:

> [I]t is not necessary that every portion of a highway be traveled upon in order to show the intention of the public authorities to accept the entire highway dedication.
>
> . . . .
>
> [T]he state's use and acceptance of the dedication prevented acquisition of the unused portion by subsequent encroachments of the parties.

Miller v. State Highway Dept., 30 Mich. App. 64, 70-71, 186 N.W.2d 67 (1971).

The land records in evidence in this case relating to F-41, specifically Exhibits 21 and 22, the findings of the trial court, *see supra* n.1, and M.C.L. 247.189, establish that a 150-foot easement existed for public use in connection with F-41. Specifically applied to the facts of this case, the easement thus extends 75 feet west from the center line of F-41. This 75-foot easement includes all of the paved portion of F-41 and its shoulder, and also includes much if not all of the grassy strip between the road and the chain link fence enclosing the air base. When the base commander ordered the temporary fence erected, he unilaterally reclaimed a portion of the easement which he was not free to occupy absent permission from the easement holder, the state of Michigan, or, conceiveably, exigent circumstances not claimed to exist.

III.

The defendants did not violate 18 U.S.C. § 1382 because they did not reenter Wurtsmith.

Once an easement is given, the grantor of the easement may not, as a general rule, interfere with the use of that easement. The permanent chain link fence running parallel to F-41 is the demarcation of the limits of Wurtsmith, and the base commander did not have the right to attempt to expand the limits of the base by unilaterally erecting the temporary fence upon the public easement. The defendants did not violate the bar letter when walking in the grassy strip between F-41 and the chain link fence because the grassy strip where they were arrested is a public way and not part of the air base within the meaning of the bar letter.

For these reasons, I respectfully dissent.

United States District Court
Eastern District of Michigan
Northern Division

United States of America,

Plaintiff,

v. Case 90-20056

Luella Bassett and
Elizabeth LaForest,

Defendants.
_____/

Oral Findings of Fact
and Conclusions of Law
Delivered December 11, 1991
by Robert Cleland, J.

THE COURT: There are certain facts the Court will find in connection with the proofs that have been presented in this case.

I find from the evidence that each of these defendants was in receipt of a bar letter. I have reviewed the administrative packets, 5A, I think it was, through 13A that were received into evidence. In each case there was a document that purported to

be such a copy of such a bar letter and purported to be countersigned, I think in all but one instance by the individual defendants.

At issue, I think, in one of those cases was a notation: Refused to sign.

But in any event, from the balance of all the evidence, I do find that each defendant was in receipt of such a letter which has come to be known in this proceeding as a bar letter.

From those facts as well, primarily, from the evidence contained within these packets, I find that the government has shown that there was an earlier entry. The precise purposes or outlines of those earlier entries have not been demonstrated, and I find it's not necessary to fully illuminate those earlier purposes in order to carry the burden of proof that's required.

Secondly, I find that each defendant was, by one form of evidence or another, properly identified as having been in and around the area and beyond the snow fence, temporarily erected barrier on the 4th of August of 1990. This was done either by stipulation or by other evidence, including the videotape and other items that were admitted into evidence.

The administrative packets, once again, there's substantial evidence in those other cases as well.

Moving beyond those issues, the more hotly contested items in this case surrounded the boundary. What is the boundary of this particular installation for the purposes of this section of the criminal code? From all of the evidence, and I have read all of the documents here, listened to arguments of counsel, as well as to the testimony that's been presented mostly Air Force

personnel on this point, I find that the Air Force Base Commander has a right to control all of the property to the edge of the roadway.

I find further that there may be some exigencies that would allow the base commander to control even the entire roadway, those exigencies are not present in this case, but at least in so far as the nontraveled portion of that so called easement area is concerned, I find the Air Force has the right to control that area, should the base commander choose in his judgment to do so.

From time to time, it appears to this Court from the evidence, such control has been exerted; at other times that control has not been exerted, the wisdom of those decisions in either controlling or not controlling the area where these defendants were found is not for this Court to decide.

Mr. Ferency argued, need I say, eloquently argued, that it would have been a less intrusive decision for the base commander to have made to have come out and had a 15 minute conversation with the assembled group that relates to the condition he spoke of. It seems to me the wisdom of the base commander's decision here is not for the Court to decide or to second guess.

It is sufficient, I think, that this Court determine that the base commander had the authority, the legal authority, to determine the control and the degree of control of that property over which his base extended.

I find that the control that was from time to time not exerted did not translate into an abandonment of the right of the Air Force to, in fact, exert that control if and when the base commander felt it was appropriate.

In other words, I find that the area in question in this case had not been converted into any form of a public forum for the dissertation of political or religious or any other kind of protected speech.

I find that the boundary on this particular day as it was established by the temporary snow fence was clearly marked, it is inconceivable that there could be any clearer method of marking a boundary than by what I see in Exhibit 16 with the red letters spelling the word Warning, three or four inches high, on a sign that's a couple of feet long. The boundary was absolutely clearly marked. There was a four or five foot high plastic fence salted with these warning signs at intervals.

And it is most clear whatever legal implications that may be argued from the right of way, the easement, the fee simple

and the land or any other kind of argument that may be presented on the ownership of this property, whatever implications may be along those lines, it is most clear that each defendant assembled in the group that I saw on the videotape, at least, thought that he or she was crossing over onto military property at the moment that snow fence was crossed.

The videotape to this Court very clearly showed a large gathering, and a peaceful one, I may add, in which the great majority of people stayed behind the line that was established by the snow fence.

I saw the snow fence periodically trod down to ground level, or near it, by people placing their feet on the top of the fence and stepping on it essentially and it would slide down the support holes and remain on the ground. Periodically an Air Force person would come over and hoist the fence

back up to its original position, it would be then be stepped on and trod down again. There was no particular confrontation that occurred in this back and forth, but it appeared to happen at least a couple different times as shown in the video. The point is, though, that a large group of people stayed behind that line, which I find was the de facto boundary of the base in this instance on the 4th of August.

Small groups of three and four and five would poise themselves at the line. They, to me, appeared to be, each of them, engaging in some form of ritual before moving on, perhaps praying. Some of them clearly in the videotape were singing, making swell speeches, one woman beating a drum at the boundary line, some form of demonstration. There was hugging, there was hand shaking, there was clapping on the

back received by the members of these group before they crossed that line.

It was eminently clear to this Court that as each group crossed that line leaving several hundred people behind, that the group that crossed beyond that line was saying what could appear to the world as being their final farewell, and moving on into foreign territory.

Only when the fence was crossed by the group in question did the applause and cheering and whistling break out from the larger group that remained behind.

From this I conclude that each person who crossed that line under those circumstances as illustrated by the videotape evidence, each individual knew what was going on, what was happening.

Each individual in this circumstance exhibited knowledge that was, in fact, the dividing line which demonstrated the Air

Force authority, and each defendant, by those actions and under those circumstances on this particular day, demonstrated to this Court's satisfaction the kind of bold defiance of authority, as a phrase from a case I may relate to the defendants, a bold defiance of authority that is spoken of in the McCoy decision from the 6th Circuit; and which was earlier related by Justice Stephens in trying to determine what degree of defiance or intentionality might be required in order to prove such a violation. For example, a commercial airliner that accidentally crosses a military landing area at a shared air base.

I find beyond a reasonable doubt that everyone of these defendants knew what was going on, and acted quite intelligently and quite intentionally in crossing that demarcation.

The fact that the Air Force decided to set up that snow fence at that precise location on the 4th of August or shortly before, is of no particular moment. It may have been set up ten feet to the north or ten feet to the south, or a hundred feet to the north or a hundred feet to the south, and still have been within the general authority that the commander of that base possessed.

Is the First Amendment implicated in any way in this case? I find it is not, and I find that consistent with decisions that I have read, every decision that I have been able to read, and I find I avail myself of, that deals with violations under similar circumstances.

It is the finding of this Court that it simply does not matter what the subject matter may have been of the intended speech or activity that the defendants or any of them may have been interested in engaging

in that day. It may well be that many members of society would have agreed with the aims in whole or in part of the group, you may take private polls of judges of various Courts, for example, and find private agreement with their political or religious or other aims. You may find government attorneys in partial or whole agreement with some or all of those aims.

I make no prediction or judgment on those issues, the point is that it does not matter. The First Amendment is not implicated and it is not, as Mr. Ferency said, for praying or for speaking or for exercising any of those rights that the defendants were arrested.

It was for being in a particular place, physically being present, without regard to the nature of the intent of the individual defendants for being present.

I'm satisfied that each defendant was intentionally present at the place where the warnings were read, where the opportunity was afforded to change his or her mind to turn around and to leave.

I'm confident, although Defendant Frances Bond testified she was uncertain, I'm confident that had a person in her position chosen to turn around and to say all right, I'm going to leave at the point that the Sergeant finished reading that final wording, that she would not have been detained and would not find herself in Court today. And I suspect that if she were to examine her heart, she may find agreement there as well.

The point is that the individuals who crossed that line had no intention of returning, and they knew that full well before they stepped over the orange snow fence.

Having received those claps on the backs, those hugs, those shouted words of encouragement, that applause, there was certainly no way that any individual short of suffering some form of severe physical ailment on their way upon the grassy knoll could have, with any degree of saving face, it seems to me, have turned around and heeded those warnings. It seems to me clear that every defendant was intent upon that course and intended to see it through to the end, and ultimately needs be to Court.

The reserved and renewed motions are each denied, that is to say that Rule 29 motion, counsel's motions to dismiss that have been referred to in closing argument.

Based upon the facts found by this Court, each defendant is determined beyond a reasonable doubt, to have violated the section of 18 United States Code, Section

1382, as charged in the Information filed against him or her.

Nos. 91-1119/20/23/24/25/26/27

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ORDER
	)	
HELEN M. LaVALLEY, ET AL.,	)	
	)	
Defendants-Appellants.	)	

BEFORE: KEITH and RYAN, Circuit Judges; and TIMBERS, Senior United States Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that

the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Filed May 1, 1992

Supreme Court, U.S.
FILED
OCT 20 1992
OFFICE OF THE CLERK

No. 92-224

In the Supreme Court of the United States

OCTOBER TERM, 1992

LUELLA BASSETT AND ELIZABETH LAFOREST,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioners violated 18 U.S.C. 1382 when they entered an area within the boundaries of Wurtsmith Air Force Base that is part of a highway easement granted by the federal government to the State of Michigan.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Flower v. *United States*, 407 U.S. 197 (1972)	7, 8
United States v. *Albertini*, 472 U.S. 675 (1985)	5, 7
United States v. *McCoy*, 866 F.2d 826 (6th Cir. 1989)	5, 6
United States v. *Parrilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981)	8, 9
United States v. *Vasarajs*, 908 F.2d 443 (9th Cir. 1990)	8

Statute:

18 U.S.C. 1382	2, 6, 7, 8

Miscellaneous:

2 G.W. Thompson, *Thompson on Real Property* (1980)	6

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-224

LUELLA BASSETT AND ELIZABETH LAFOREST,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 957 F.2d 1309.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1992. Petitions for rehearing were denied on May 1, 1992. The petition for a writ of certiorari was filed on July 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of unlawfully reentering a military base after the base commander ordered them not to do so, in violation of 18 U.S.C. 1382.[1] Petitioner Bassett was sentenced to 60 days' imprisonment and petitioner LaForest was sentenced to 21 days' imprisonment. Each petitioner was fined $1,000. The court of appeals affirmed. Pet. App. 1-18.

1. The evidence at trial showed that the federal government granted Iosco County, Michigan, a 150-foot-wide easement for the construction, maintenance, and use of a county highway along the edge of Wurtsmith Air Force Base. The easement extends 60 feet on each side of the highway. On the base side of the highway, the easement includes a grass strip located between the "white line" marking the edge of the highway and a permanent chain link fence. Pet. App. 3.

On August 4, 1990, the base commander had an orange snow fence, approximately three to four feet high, placed along the white line marking the edge of the highway. The fence ran for some distance along

---

[1] That Section provides, in pertinent part:

> Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> Whoever reenters or is found within any such [place] after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—
>
> Shall be fined not more than $500 or imprisoned not more than six months, or both.

the highway before running perpendicular to the highway across the grassy strip to join the permanent chain link fence. Pedestrian traffic was blocked on the grassy strip at the point where the snow fence intersected the permanent steel fence. Warning signs were mounted on the snow fence roughly every 20 feet, stating, "It is unlawful to enter this area without permission of the installation commander." Pet. App. 3-4.

Petitioners, together with a group of approximately 400 other protestors, marched down the grassy strip toward the base entrance until they encountered the snow fence. At that point, they pushed down the snow fence. Some of the protesters, including petitioners, entered the restricted portion of the base. Master Sergeant Brian Clever ordered the group to leave the base, reading the following statement:

> You are on a United States military reservation at Wurtsmith Air Force Base, Michigan.
>
> Specific permission of the installation commander is required for entry onto Wurtsmith Air Force Base and that permission has not been granted.
>
> The installation commander has determined that any political or protest demonstration taking place within the boundaries of Wurtsmith Air Force Base could interfere with the mission of the 379th Bombardment Wing.
>
> By order of the installation commander, Wurtsmith Air Force Base, you are hereby ordered to leave Wurtsmith Air Force Base.
>
> Your continued presence in Wurtsmith Air Force Base will place you in violation of the lawful order to leave and you will also be in violation of lawful

> regulations prohibiting your entry onto Wurtsmith Air Force Base.
>
> Your continued presence on Wurtsmith Air Force Base may render you criminally liable for violation of federal law.
>
> You are again ordered to depart Wurtsmith Air Force Base immediately.

Pet. App. 4-5.

When petitioners refused to leave after receiving that warning, they were arrested. The evidence at trial showed that petitioners had previously entered the base and had received letters from the base commander barring them from future entry. Pet. App. 5.

2. In finding petitioners guilty, the district court determined, among other things, that the Air Force had authority "to control all of the property to the edge of the roadway," and, under some circumstances, "even the entire roadway," if the base commander "should * * * choose in his judgment to do so." Pet. App. 22. The court observed that the base commander had exercised such control from time to time, and held that the base commander's decision not to exercise control at all times did not constitute an abandonment of the Air Force's authority over the area. The court also decided that "the area in question in this case had not been converted into any form of a public forum for the dissertation of political or religious or any other kind of protected speech." Pet. App. 24.

3. On appeal, petitioners argued that they were lawfully on the grassy strip at the time they were taken into custody because the federal government had granted Michigan an easement that included the land abutting the highway. In rejecting that con-

tention, the court of appeals relied on its previous decision in *United States* v. *McCoy*, 866 F.2d 826 (6th Cir. 1989), in which it had determined that the grassy strip on which petitioners were apprehended "was within the boundary * * * of the base." Pet. App. 8. The court stated that "[t]he mere fact that an easement had been granted to the state for the construction, maintenance and use of [a highway] did not give the protestors the right, in bold defiance of military authority, to enter the base, after being previously barred." *Ibid.* The court noted that a "different question would be presented" if petitioners' only intrusion into the base was driving an automobile on the highway, since that would involve the use of an easement on military lands "for the limited public purpose[] for which [it] ha[d] been set aside." *Ibid.* (quoting *United States* v. *Albertini*, 472 U.S. 675, 698-699 (1985) (Stevens, J., dissenting)).[2]

ARGUMENT

Petitioners renew their contention that they did not unlawfully enter Wurtsmith Air Force Base, because the base commander lacked authority to bar them from an area that is part of a highway easement granted by the federal government to the State of Michigan.

1. As the court of appeals noted, the grassy area adjacent to the highway had previously been held to be within the boundaries of the Wurtsmith Air Force Base. See *United States* v. *McCoy*, 866 F.2d at 829 (diagram showing boundary line of base as including grassy area adjacent to highway); *id.* at 831 (stating

[2] Judge Ryan dissented, concluding that the grassy strip where [petitioners] were arrested is a public way and not part of the air base within the meaning of the bar letter." Pet. App. 18.

that area west of boundary line, which includes the grassy strip at issue here, is part of the Wurtsmith base). The court in *McCoy* acknowledged that the federal government had granted an easement to the State of Michigan for the construction of a highway through the base, but found that the area of the easement was still "part of [the] military installation." *Id.* at 830.

An easement is the right in the owner of one parcel of land to use the land of another for a special purpose. See 2 G.W. Thompson, *Thompson on Real Property* § 315, at 2 (1980). Here, as the court of appeals observed, Pet. App. 8, the federal government granted the easement to the State of Michigan specifically "for the construction, maintenance and use of [the] highway." See 2 G.W. Thompson, *supra*, § 386, at 532 ("One granting an easement may limit the grant, and the grantee takes it subject to the restrictions imposed and cannot enlarge or abuse his privilege."). Although there was evidence that other public uses of the property covered by the easement were sometimes tolerated, the district court explicitly found, Pet. App. 23, that the base commander had not abandoned the right to control the area at issue.

This is not to say that the base commander could properly have interfered with the use of the land as a highway, the "limited public purpose for which it had been set aside," *McCoy*, 866 F.2d at 831. But that was not what the commander did here. Petitioners did not enter the base for the limited purpose of using the highway for transportation; they were therefore not in a position to claim protection based on the easement granted to the State. Moreover, petitioners were convicted for defiance of "bar letters" issued under 18 U.S.C. 1382, which specifically forbade them from entering the base. Petitioners do not contend

that there was any defect in the bar letters, nor did the base commander lack authority to issue them. The granting of a limited easement does not negate the military commander's authority to punish reentry in defiance of his orders under Section 1382, nor does it contract the boundaries of the base for purposes of applying that Section. Since the grassy area adjacent to the highway was part of the base, the government could prosecute petitioners for reentry based on their presence in that area.

2. This Court's decision in *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam), does not help petitioners. In that case, the defendant was convicted of violating Section 1382 by "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston" in San Antonio, Texas. 407 U.S. at 197. No sentry was posted anywhere along the street, which was open at all times to the public for a variety of activities. *Id.* at 198. In summarily reversing the conviction, the Court determined that "New Braunfels Avenue was a public thoroughfare no different than other streets in the city, and that the military had abandoned not only the right to exclude civilian traffic from the avenue, but also any right to exclude leafleteers." *United States* v. *Albertini*, 472 U.S. 675, 685 (1985).

In *Flower* the military had completely abandoned control of the area in question to both vehicular and pedestrian traffic. This case is significantly different, because the military retained control over the grassy strip subject only to an easement granted to the State to build and maintain a highway. Although the military had occasionally tolerated other uses of the grassy strip abutting the highway, it had consistently asserted its authority over the area. On the day in question, its assertion of authority was clearly

indicated by the presence of the snow fence, the posted signs, and the oral warnings delivered directly to petitioners. Under these circumstances, the district court correctly determined that the military had not abandoned its control over the disputed area, as it had in *Flower*.

3. Nor is there any conflict between the decision below and the lower court cases on which petitioners rely. In *United States* v. *Vasarajs*, 908 F.2d 443 (9th Cir. 1990), the defendant, who had previously been barred from a military reservation, was convicted of violating Section 1382 by driving her car on the road between the end of a highway exit ramp and the main gate of the reservation. The court of appeals upheld the conviction, finding that the area in question was part of the reservation and that the government had not relinquished control over the area. The court observed that the defendant had not made the argument that, as a member of the public at large, she "benefit[ed] from a properly created easement" on the area at issue, 908 F.2d at 446; the court reserved the question whether the existence of an easement would require a different result. Thus the *Vasarajs* decision does not support petitioners' claim that, after granting an easement for the use of military property as a highway, the government could not restrict the use of that property to activities related to the purpose of the easement.

In *United States* v. *Parrilla Bonilla*, 648 F.2d 1373 (1st Cir. 1981), on which petitioners also rely, the defendants were convicted under Section 1382 of unlawfully entering a Navy installation used for amphibious landings. At trial, the government took the position that the installation's true border was the ordinary high tide line of the island where the installation was located. On appeal, the government

conceded that it had failed to prove that the defendants crossed that line, but it argued that the entire beach was part of the installation. The court of appeals rejected that argument on the ground that it had never been presented in the district court. 648 F.2d at 1385-1386. In this litigation, by contrast, the government has contended from the first that the grassy strip on which petitioners were arrested is part of the Air Force base. Accordingly, *Parrilla Bonilla* is inapposite.[3]

---

[3] Petitioners argue (Pet. 23-27) that under Michigan law the base commander was without authority to obstruct the easement by the erection of the temporary snow fence, and that petitioners were therefore "privileged to abate this nuisance because their rights to use the easement for its intended purpose of transportation were paramount to all other uses and because they were able to do so without breaching the peace." Pet. 26. Petitioners, however, were not using the grassy strip for transportation; rather, their purpose was to stage a protest involving approximately 400 people, and they remained on the base property after being advised that they were required to leave. Even if the erection of the snow fence might have been impermissible under Michigan law, it does not follow that petitioners were entitled to reenter the military base, having previously been lawfully barred, for a purpose not covered by the easement. In any event, this issue of state property law does not warrant the Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

OCTOBER 1992